ROTH-ALBERTS HELD INAPPOSITE TO FILMED OBSCENITY

Trans-Lux Distrib. Corp. v. Board of Regents, 14 N.Y.2d 88, 198 N.E.2d 242, 248 N.Y.S.2d 857 (1964)

In March, 1962, the Bureau of Customs approved the importation of the Danish motion picture "A Stranger Knocks" (hereafter referred to as "the Film") by Trans-Lux Distributing Corporation, owner of the distribution rights in the United States, after objectionable scenes had been deleted at the direction of a customs official.[1] One year later, on the Distributing Corporation's application for a license to exhibit the Film in New York, the Director of the Motion Picture Division of the State Education Department denied a license until the Distributing Corporation cut two scenes depicting sexual intercourse[2] which the Director had found "obscene pursuant to Section 122[3] of the State Education Law."[4] The State Board of Regents sustained the determination of the Director. In a proceeding on appeal before the Appellate Division of the State Supreme Court,[5] the court, in a memorandum, annulled the Board's determination,

[1] Record, pp. 65-69, Trans-Lux Distrib. Corp. v. Board of Regents, 19 App. Div. 2d 937, 244 N.Y.S.2d 333 (1963).

[2] The scenes were described as follows:

Reel 3D: In scene on beach between man and Vibecka after she has discarded her bathing suit, eliminate view of man's hand moving robe aside and carressing her bare knee and thigh, views of man moving into position on her body, and closeup view of her face indicating her erotic response to completion of coital act. Reel 4D: In scene in which Vibecka and man engage in sexual intercourse on couch, eliminate all views from point where she is seen straddling his body to point at which she notices scar on his arm. *Id.* at 38-39.

[3] *Ibid.* N.Y. Educ. Law § 122 (McKinney Supp. 1964) provides:

Licenses: the director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

N.Y. Educ. Law § 122-a (McKinney Supp. 1964) provides, in pertinent part:

Definitions. 1. For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

[4] Record, *supra* note 1, at 39.

[5] The case was referred from State Supreme Court for disposition.

found the Film not obscene,[6] and ordered the Board to issue a license. The Appellate Division held the *Roth-Alberts* test[7] controlling with respect to the Film's allegedly obscene scenes, and believed without elaboration that the Supreme Court's summary reversal in *Times-Film v. City of Chicago*[8] was, by analogy, dispositive of the issue. The dissent, implicitly adopting the language of the Model Penal Code,[9] believed that "the portrayals therein go substantially beyond the accepted customary limits" and, consequently, refused to apply *Roth-Alberts,* stating that: ". . . these delineations are *sui generis,* rendering the usual test of obscenity impossible to apply with any reasonableness." [10]

On appeal to the court of appeals, the case was reversed and remanded to reinstate the Board's determination.[11] The two objectionable scenes portraying sexual intercourse were deemed obscene within the State Education Law because they portrayed obscene behavior on the screen but

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[6] Trans-Lux Distrib. Corp. v. Board of Regents, 19 App. Div. 2d 937, 244 N.Y.S.2d 333 (1963). The court said: "The decisions of the Supreme Court in Times Film Corp. v. City of Chicago (355 U.S. 35) and Roth v. United States (354 U.S. 476) compel us to annul the determination of the Board of Regents. The sexual acts, which are implied rather than demonstrated, are an integral part of the play."

[7] Roth v. United States and Alberts v. California, 354 U.S. 476 (1957) (Res: mailing, keeping for sale, and advertising obscene matter). The Supreme Court held that "obscene material is material which deals with sex in a manner appealing to prurient interest." (*id.* at 487) which the Court defined as "material having a tendency to excite lustful thoughts." *Id.* at 487 n. 20. The test then became: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

[8] 355 U.S. 35 (1958), *reversing* 244 F.2d 432 (7th Cir. 1957) (Film: "Game of Love"; theme: sexuality). Scenes from the film variously depicted a boy in the nude, his seduction by an older woman, and sexual relations with other girls. The court below described the film at 436: "The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized. . . . the calculated purpose of the producer of this film, and its dominant effect, are substantially to arouse sexual desires."

[9] Model Penal Code § 251.4(1), (Proposed Official Draft, May 4, 1962). "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and *if in addition* it goes substantially beyond customary limits of candor in describing or representing such matters." (Emphasis supplied.) Judicial use of the word "obscenity," as above, has improperly restricted its meaning. Etymologically, obscenity denotes ugliness; that which is offensive or disgusting. See Partridge, Origins: A Short Etymological Dictionary of Modern English (1959) and D. H. Lawrence Pornography and Obscenity (1930).

[10] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 6, at 937; 244 N.Y.S.2d at 333.

[11] Trans-Lux Distrib. Corp. v. Board of Regents, 14 N.Y.2d 88, 198 N.E.2d 242. 248 N.Y.S.2d 857 (1964) (4 to 3 decision), *appeal docketed,* 33 U.S.L. Week 3045, (U.S. July 22, 1964) (No. 314).

not because of any advocacy of "obscene" ideas (commonly referred to as thematic obscenity).[12]

The Film's theme is a contrived adaptation of Cain's legend.[13] A widow, mourning her husband's death while he was serving in the Danish Resistance, lives in seclusion. A chance encounter with a stranger who, unknown to her, is a Nazi collaborator now on the run, leads to an illicit relationship, where her surrender and satisfaction are obviously physical. In a disputed scene[14] at the height of their passion, she notices a scar—symbolizing the mark set upon Cain—which reveals her partner as her husband's executioner. Vengeance is hers as she wrings a confession from her lover and finally kills him.

Whatever redeeming social importance the Film may have indisputably stems from its updating of the ancient cycle—murder engendering vengeance which precipitates still another murder—and its depiction of the continuance of the cycle because of man's stubborn refusal to accept a rule of law or, ultimately, the will of the Almighty. Arguably, the recognition scene is a thematic *sine qua non,* not only because it emphasizes the cyclical progression of the theme, but also because it communicates the impression that love and hate co-exist, disguised as diametrically opposed attitudes, in one individual, however latent one attitude may appear at any given point in time. Although in condemning the two sequences the court laid particular emphasis on the woman's "facial expressions indicative of orgasmic reaction" and "their bodily movements," [15] it at least recognized the thematic structure of the Film, quoting from the Distributing Corporation's affidavit which described the Film's climax as "a groan of pleasure and pain, a dramatic and eloquent expression of the persistent ambivalence in the relationship." [16]

The core of the court of appeals' reasoning (implicitly adopted from the dissenting opinion below), finds the Film raising the issue of obscenity in isolated filmed behavior, rather than obscenity in the advocacy of a theme. New York decisions condoning prohibition of the latter have consistently been reversed on appeal by the United States Supreme Court.

For example, in *Joseph Burstyn Inc. v. Wilson,*[17] the Supreme Court, reversing New York's proscription on thematic sacrilege in the film, "The Miracle," held such statutory censorship void for its vagueness and all-

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[12] The issues of prior restraint, imposed by the New York statute, and federal preëmption, created by the prior determination made by the Bureau of Customs, were not discussed by the court, though they were properly raised and preserved. They will not be included within the limited scope of this note.

[13] The following quote from Genesis 4:15 was superimposed on the screen: "And the Lord set his mark upon Cain lest any finding him should kill him. Therefore whosoever slayeth Cain, vengeance shall be taken from him sevenfold."

[14] See *supra* note 2 for a description.

[15] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 11, at 90, 198 N.E.2d at 243, 248 N.Y.S.2d at 858.

[16] *Ibid.*

[17] 343 U.S. 495 (1952), *reversing* 303 N.Y. 242, 101 N.E.2d 665 (Film: "The Miracle"; theme: sacrilege).

inclusiveness. But the Supreme Court noted that it had not considered the question of cinematic censorship "under a clearly drawn statute designed and applied to prevent the showing of obscene films."[18] Thus the *Burstyn* Court, while supporting the protection of thematic advocacy in film,[19] recognized that the difference in the manner of filmed communication may necessitate regulation:

> Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.[20]

This distinction was extracted in *Trans-Lux* and used to justify avoidance of the *Roth-Albert* test.

Subsequently, in *Commercial Pictures Corp. v. Board of Regents*[21] the Supreme Court, relying solely on *Burstyn,* summarily reversed the New York Court of Appeals, which had denied a license to a film depicting fornication and adultery. The film, "La Ronde," had been deemed immoral by the Board because its exhibition "would tend to corrupt morals" within the meaning of section 122 of the Education Law.[22] The important underlying philosophy in *Burstyn* and *Commercial Pictures*—a philosophy initiated by Mr. Justice Holmes in *Schenck v. United States*[23] and adopted by *Trans-Lux*—is that the matter to be expressed is constitutionally protected, but the manner of that expression is susceptible to regulation.

Significant with respect to the matter-manner distinction is the handling in *Trans-Lux* of New York's most recent case on cinematographic obscenity, *Kingsley Int'l Pictures Corp. v. Regents.*[24] The *Trans-Lux* court refers only to Mr. Justice Stewart's differentiation between the cinematic expression of an idea (therein advocacy of adultery) and the manner of its portrayal. Mr. Justice Stewart had said, in pertinent part:

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[18] *Id.* at 506.

[19] Joseph Burstyn Inc. v. Wilson, *supra* note 17, at 501: "It cannot be doubted that motion pictures are a significant media for the communication of ideas. . . . The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." See also Winters v. New York, 333 U.S. 507, 510 (1948).

[20] Joseph Burstyn Inc. v. Wilson, *supra* note 17, at 503.

[21] 346 U.S. 587 (1954), *reversing* 305 N.Y. 336, 113 N.E.2d 502 (1953).

[22] The court of appeals may have oversimplified the issue: "It should be remembered that we are not here dealing with a moral concept about which our people widely differ; sexual immorality is condemned throughout our land." Commercial Pictures Corp. v. Board of Regents, 305 N.Y. 336, at 347, 113 N.E.2d 502, at 507.

[23] 249 U.S. 47, 52 (1919). The Justice's classic remark was, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

[24] 360 U.S. 684 (1959), *reversing* 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958) (Film: "Lady Chatterley's Lover," a French import; theme: adultery).

> [T]he New York Court of Appeals tells us that the relevant portion of the New York Education Law requires the denial of a license to any motion picture which approvingly portrays an adulterous relationship, quite without reference to the manner of its portrayal.[25]

The *Trans-Lux* court adopts Justice Stewart's distinction in order to distinguish *Kingsley* and to place the Film in issue in the category wherein the manner of expression may be constitutionally regulated.

The confusion surrounding the Supreme Court's decision in *Kingsley* eventuates from the fact that the High Court purposely avoided a confrontation on the issue of obscenity per se; rather, it preferred to dispose of the case on the ground, previously charted in *Burstyn*,[26] that the exhibition of a motion picture may not be prohibited because of an idea which that picture advocates.[27] The issue of obscenity, however, was raised and preserved by both Kingsley [28] and the Board.[29] And contrary to the view of the Supreme Court, Chief Justice Conway, speaking for the majority, unmistakably believed and held that the film was obscene: "We reiterate that this case involves the espousal of sexually immoral acts (adultery) plus actual scenes of suggestive and obscene nature." [30] Yet

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[25] *Id.* at 688.

[26] See notes 17-20 *supra*, and accompanying text.

[27] Kingsley Int'l Pictures Corp. v. Board of Regents, 360 U.S. 684 at 688.

[28] Brief for Respondent, Point II, p. 11, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) *reversing* 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958).

[29] Brief for Appellant, Point I, pp. 6-7, 9, Kingsley Int'l Pictures Corp. v. Regents, *supra* note 28.

[30] Kingsley Int'l Pictures Corp. v. Regents, 4 N.Y.2d at 356, 151 N.E.2d at 200, 175 N.Y.S.2d at 44 (parenthetical insert supplied.) See also 4 N.Y. 2d 349 at 354, 358; 151 N.E.2d 197 at 199, 201; 175 N.Y.S.2d 39 at 42, 46. Note the similarity between the statement of the objectionable scenes in *Kingsley*, which follow, and the *Trans-Lux* scenes, *supra* note 2:

> Reel 2D: Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress, to end of sequence.
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> Reel 3D: Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:
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> |---|---|
> | "Mais tu es nu. . . | "But you're nude. . . |
> | Tu es nue sous ta robe, | You're nude under your dress, |
> | et tu ne le disais pas. . . | and you didn't say so. . . |
> | Que'est-ce que tu as?" | What is it?" |
>
> Eliminate accompanying English superimposed titles:
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> "You have nothing on. . ."
>
> "And you didn't say so. . ."
>
> "What is it?"
>
> Reel 4D: Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress. Reason: "Immoral" within the intent of our law. Record, Exhibit A, p. 21; see also Brief for Appellant, *supra* note 29, at 4-5.

the Supreme Court, in the teeth of Chief Justice Conway's opinion, said: "The Court of Appeals unanimously and explicitly rejected any notion that the film is obscene." [31]

It would seem that the New York court in *Kingsley* recognized that the dominant theme of the film, taken as a whole, was not obscene under the *Roth-Alberts* test,[32] notwithstanding the two objectionable scenes, and therefore predicated its holding not only on the "scenes of obscenity"[33] but also on the film's presentation of adultery as a proper pattern of behavior. Thus this new ground which the Supreme Court sedulously avoided in *Kingsley* has become the key issue which *Trans-Lux* now raises again.

Because the *Trans-Lux* court could not dismiss judicial acceptance of thematic obscenity, it carefully sought to predicate its holding specifically on the question of the obscenity *vel non* of isolated filmed behavior. The result was reached via an analogy between New York's acknowledged power to control sexual behavior displayed in public and its power to control similar behavior represented on the screen. The court confined the censor to cinematographic conduct which, had it occurred in public, would have been *contra bonos mores*.[34] Curiously, the court failed to discuss its prior holding in *Matter of Excelsior Pictures Corp. v. Board of Regents*,[35] wherein a fictionalized depiction of the activities of members of a nudist group in a secluded private camp was found not obscene. Yet Mr. Justice Desmond's analogy for the majority in *Excelsior* squares with the analogy relied on in *Trans-Lux*. The theory that "the showing of crimes in . . . cinema is evil only when it is done in a dirty way or when it glorifies the criminal act," [36] has as its progeny Mr. Justice Burke's present theory that a filmed simulation of real conduct, which conduct is illegal solely because it is shocking, offensive to see and generally destructive of morality, shares the evil of the original.[37]

In sum, the court struck a line between permissible advocacy and proscribed action. Speech (the communication of an idea) was not regarded as the issue; rather, a particular display of conduct (the vehicle for the communication of that idea), which "bears no necessary relationship to

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[31] Kingsley Int'l Pictures Corp. v. Board of Regents, 360 U.S. 684, 686.

[32] *Supra* note 7.

[33] Kingsley Int'l Pictures Corp. v. Board of Regents, 4 N.Y.2d 349 at 354, 175 N.E.2d at 199, 175 N.Y.S.2d at 42.

[34] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 11, at 93, 198 N.E.2d at 245, 248 N.Y.S.2d at 861.

[35] 3 N.Y.2d 237, 144 N.E.2d 31, 165 N.Y.S.2d 42 (1957), *affirming* 2 App. Div. 2d 941, 156 N.Y.S.2d 800 (1957) (Film: "Garden of Eden"; theme: nudity).

[36] For a discerning definition of obscenity as that which is dirty, revolting to the senses and, therefore, unappealing, see D. H. Lawrence, *op. cit. supra* note 9, at 12-13 and discussion by Mr. Justice Frankfurter, concurring in Kingsley Int'l Pictures Corp. v. Board of Regents, 360 U.S. 684, 692-93.

[37] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 11, at 93, 198 N.E.2d at 245, 248 N.Y.S.2d at 861.

the freedom to speak, write, print, or distribute information or opinion" [38] was forbidden. That distinction adhered to the Supreme Court's generally protective attitude toward thematic expression in film and, at the same time, gave the Board a guideline within which it could proscribe filmed sexual behavior under New York's statute.

Pending final disposition of *Trans-Lux* by the Supreme Court, New York's judicial superintendence over the obscene has clearly set apart filmed behavior from pictorial [39] or printed [40] communication. As early as 1922, Mr. Justice Andrews, speaking for the court of appeals on the obscene in literature, declared:

> No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. . . . The book, however, must be considered broadly as a whole.[41]

This rule for printed work both foreshadowed the *Roth-Alberts* test and underlined the prevailing trend in New York.[42] Recently, Mr. Justice Desmond bitterly scored what should be the last word on written obscenity:

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[38] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 11, at 95, 198 N.E.2d at 247, 248 N.Y.S.2d at 863, the court quoting from Schneider v. State, 308 U.S. 147, 161 (1939). *Trans-Lux* relied on People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), *appeal dismissed for want of a substantial federal question*, 375 U.S. 42 (1963), wherein an ordinance prohibiting maintenance of a clothesline in a yard abutting a street did not constitute an unconstitutional abridgement of free speech of property owners who erected clotheslines, cluttered with bizarre paraphernalia, as a "peaceful protest" against their tax assessment. The *Stover* court said at page 470, 191 N.E.2d at 277, 240 N.Y.S.2d at 740: "The ordinance and its prohibition bear 'no necessary relationship' to the dissemination of ideas or opinion. . . . It is obvious that the value of their 'protest' lay not in its message but in its offensiveness."

[39] *E.g.*, People v. Richmond County News, Inc., 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961) (Magazine: "Gent"); Larkin v. G.I. Distribs., Inc., 14 N.Y.2d 869 (1964) (Magazine: described as similar to "Gent").

[40] *E.g.*, Larkin v. G.P. Putnam's Sons, 14 N.Y.2d 399 (1964) (Book: "Memoirs of a Woman of Pleasure," known as "Fanny Hill"; theme: sexuality).

[41] Halsey v. New York Soc'y for the Suppression of Vice, 234 N.Y. 1, 4, 136 N.E. 219, 220 (1922) (Book: "Mademoiselle de Maupin").

[42] In what is now a maverick case, the conviction of a book publisher was upheld in People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713, 243 N.Y.S.2d 1 (1963) (Book: "Tropic of Cancer"). But *Fritch* was rendered inefficacious by the Supreme Court's per curiam opinion on the same work in Grove Press, Inc. v. Gerstein, 84 Sup. Ct. 1909 (1964), *reversing* 156 So. 2d 537 (Fla. App. 1963). Subsequently, the New York Court of Appeals held "Fanny Hill"—"an erotic book, concerned principally with sexual experiences largely normal, but some abnormal"—not obscene, and in so doing, expressly recognized the Supreme Court trend in *Grove Press* and Tralins v. Gerstein, 84 Sup. Ct. 1903 (1964), *reversing* 151 So. 2d 19 (Fla. App. 1963) (Book: "Pleasure Was My Business"; theme: brothel life). Larkin v. G.P. Putnam's Sons, *supra* note 40.

> In New York State from now on there are not and cannot be any barriers to the general sale to purchasers of any age of the most blatant and unmistakable pornography provided there be discoverable therein some social or stylistic significance.[43]

Prior to *Trans-Lux,* the probable performance of the New York court should have been predictable not only by its approval of a nudist film[44] and a film demonstrating, at once candidly and scientifically, human birth,[45] but also by the Supreme Court's directive that an immoral theme is worthy of first amendment protection.[46] But with the decision in *Trans-Lux,* the Board can proscribe explicitly filmed sexual intimacies per se without applying the *Roth-Alberts* test:[47] whether, by applying the contemporary *national*[48] standard, the dominant theme of the film taken as a whole, including the obscene sequences, would appeal to the prurient interest of an average person.

Rather, New York's procedure for uncovering and deleting obscene sequences, as derived from *Trans-Lux,* would necessitate four steps: (1) the questioned scene is isolated from the film; (2) the scene is appraised to determine that it displays on the screen conduct forbidden in public solely because such conduct is (a) obscene and (b) proscribed by statute; (3) following, a fortiori, it is determined that the scene is obscene under the state regulatory law, and (4) the scene is ordered eliminated from the film before the acceptable remainder is licensed for exhibition.

From the posture of workability, this method has a noteworthy drawback. The test fails to take into account the possibility that the scene, notwithstanding its obscene nature when judged per se, may be a significant element in the artistic communication of a socially important theme. In recognizing that obscenity may flourish in non-thematic interludes of

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[43] *Supra* note 40, at 406.

[44] Excelsior Pictures Corp. v. Board of Regents, *supra* note 35.

[45] Capital Enterprises v. Regents, 1 App. Div. 2d 990, 149 N.Y.S.2d 920 (1956) (Film: "Mom & Dad"; theme: child birth).

[46] Commercial Pictures Corp. v. Board of Regents, *supra* note 21, and Kingsley Int'l Pictures Corp. v. Board of Regents, *supra* note 24.

[47] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 11, at 96, 198 N.E.2d at 247, 248 N.Y.S.2d at 863. The court's deviation from the strict *Roth-Alberts* test may have been predictable from prior court dicta: *"If any single item,* considered as a whole, were pornographic, the circumstance that it was included in a collection otherwise without taint would not save it from criminal prosecution." People v. Richmond County News, Inc., *supra* note 39, at 587, 175 N.E.2d at 686, 216 N.Y.S.2d at 376. (Emphasis supplied.)

[48] The Supreme Court abruptly switched to a national standard in Jacobellis v. Ohio, 84 Sup. Ct. 1676 (1964) (Film: "The Lovers"; theme: adultery): "We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding." *Id.* at 1682.

Chief Justice Warren, dissenting, replied: "It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards' it meant community standards—not a national standard as is sometimes argued." *Id.* at 1685. See note 52 *infra,* and accompanying text.

films, the court discovered a distasteful reality—possible irresponsible commercial exploitation of obscenity—which should be curbed.[49] But the remedy becomes less desirable than the malady when the test precludes isolated obscenity regardless of its materiality to the theme. *Roth-Alberts* recognized that the entire work demands appraisal as a prerequisite to a determination of its obscene quality. And *Manual Enterprises v. Day*[50] took further steps to protect expression by requiring a showing—before *Roth-Alberts* became applicable—of materials

> deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged.[51]

Foreshadowing the disposition of *Trans-Lux* on appeal, the Supreme Court, in *Jacobellis v. Ohio*,[52] reaffirmed its position that the standard in *Roth-Alberts* is applicable to the film media and held that an explicit love scene was not obscene by that standard. The scene in issue, which *inter alia* visually suggested cunnilingus, was inadequately described by the Ohio Court as ". . . three minutes of complete revulsion during the showing of an act of perverted obscenity."[53] Some of the testimony indicated that the depiction of the unreserved love affair was necessary not only to show that the heroine was not flitting simply from one affair to another, but also to make her transformation and conduct appear credible.[54] The Supreme Court, employing broad brushstrokes, gave no description of the film's theme or the questioned scene.[55] This omission will not facilitate the application of *Roth-Alberts* to prospective obscenity cases!

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[49] Trans-Lux Distrib. Corp. v. Board of Regents, *supra* note 11, at 96, 198 N.E.2d at 247, 248 N.Y.S.2d at 863.

[50] 370 U.S. 478 (1962), *reversing* 289 F.2d 455 (D.C. Cir. 1961) (Magazines: "MANual," "Trim," and "Grecian Guild Pictorial").

[51] *Id.* at 482.

[52] *Supra* note 48. The decision in *Jacobellis* was handed down midway between New York's decision in *Trans-Lux* and the submission of the jurisdictional statement on appeal. A resolution of the conflict of judicial attitudes marked by *Jacobellis* and *Trans-Lux* is particularly important in light of several obscenity cases which currently appear on New York's appellate docket. *E.g.*, People v. Lida, 42 Misc. 2d 56, 247 N.Y.S.2d 421 (Crim. Ct. 1964), People v. Hay, 41 Misc. 2d 606, 245 N.Y.S.2d 705 (Crim. Ct. 1963).

[53] 173 Ohio St. 22, 28, 179 N.E.2d 777, 781 (1962).

[54] Record, p. 462, Brief for Appellant, p. 8, Jacobellis v. Ohio, *supra* note 48.

[55] The film portrayed a genteel woman's boredom with life among her coterie and with her dutiful but preoccupied husband. Her meeting a poetic young student was accidental, their physical attraction explosive, as he becomes the vehicle by which she can renounce her secure world. With her paramour, she abandons her home and her child, expecting a grim, uncertain future, yet regretting nothing.

Judges, attorneys, and students of the subjects cannot predict with sufficient certainty what filmed behavior the Court would proscribe because the Court has not adequately described the filmed behavior it has condoned.[56]

It would also appear that the Supreme Court has not given film reviewing boards a workable standard, because it has not recognized the apparent fact that a film, although thematically acceptable when judged in its entirety, may contain isolated but patently offensive sequences of no social value by the national standard. In addition, these scenes may not serve the idea the film advocates. The *Trans-Lux* court appreciated that problem when it held the *Roth-Alberts* standard not applicable if the censor was willing to license the Film conditioned upon the deletion of the objectionable scenes. But the question should then become whether the censor's scissor should delete a scene which the craftsman feels is essential to an aesthetic appreciation of the entire film. A reasonable answer incorporating *Roth-Alberts* would necessitate a weighing of the scene's prurient appeal against that scene's relationship to the redeeming social importance of the entire film. Particular emphasis should be placed on whether the scene's deletion would attenuate the film's social message. This intermediary weighing process would determine the fate of that scene per se. The traditional *Roth-Alberts* test should still be applied to the film taken as a whole. Again, emphasis should bear on whether the disputed scene so infected the film that it must be cut if the film is to retain the protection of the first amendment.

Furthermore, an obvious omission in Supreme Court opinions to date is a full consideration of the effect of modal differences in communication among the media and dissimilar marketing methods within the medium. It is strikingly apparent that cinematic expression of obscenity has the inherent capacity for the greatest evil:[57] (1) films are capable of depicting the obscene in its most graphic form, (2) films prey on the group audience whose attention is directed and concentrated on a screen with minimal distraction, the combination of which factors increases the individual's response to whatever prurient stimulus is present, (3) films attract the unsophisticated youngster because, *inter alia,* films generally require less mental concentration and comprehension for their enjoyment, and (4) films are susceptible to irresponsible marketing techniques directed at an immature audience with emphasis upon the film's seamy episodes.

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[56] Mr. Justice Stewart, concurring, was not particularly instructive: ". . . I know [hard core pornography] when I see it and the motion picture involved in this case is not that." Jacobellis v. Ohio, *supra* note 48, at 1683.

[57] However, Mr. Justice Douglas, concurring in Commercial Films Corp. v. Regents, *supra* note 21, at 588, lumped films with other media of communication, suggesting that censorship is per se inapplicable to all media:

> Motion pictures are of course a different medium of expression than *(sic)* the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. The movie, like the public speech, radio, or television, is transitory—here now and gone in an instant.

The study of a combination of these and other factors has been frequently referred to as the theory of variable obscenity.[58] Chief Justice Warren, concurring in *Roth-Alberts,* recognized the importance of applying such variables to each obscenity question, and suggested that different results may be realized under varying circumstances:

> The line dividing the salacious or pornographic. . . is not straight and unwavering. . . . It is manifest that the same object may have a different impact, varying according to the part of the community reached. . . . The nature of the standards is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.[59]

His argument has been virtually ignored by all but scholarly writers, though some legislation has been drawn restricting the exhibition of films "for adults only." [60] Such classification legislation faces as its most serious obstacle attacks on its vagueness [61] and unreasonableness.[62] Sufficient particularity in drafting is necessary to provide adequate guidance for exhibitor and censor.

It is suggested that the significant non-procedural[63] distinction that can be drawn between *Jacobellis* and *Trans-Lux* is that the latter expressly denies applicability of *Roth-Alberts* to obscene conduct. On that basis, *Trans-Lux* should be reversed summarily on the strength of *Jacobellis,* unless the Supreme Court decides to depart from *Roth-Alberts* and permit the deletion of specific patently offensive material. Taking the latter course, the fate of *Trans-Lux* hinges on the Court's view of the composition and character of the obscene in relief from the thematic structure of the Film in its entirety.[64]

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[58] See Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standard," 45 Minn. L. Rev. 5, 68, 120 (1960).

[59] Roth v. United States, *supra* note 7, at 495-96.

[60] See Note, "'For Adults Only': The Constitutionality of Governmental Film Censorship by Age Classification," 69 Yale L.J. 141 (1959).

[61] *E.g.,* Paramount Film Distribs. Corp. v. City of Chicago, 172 F. Supp. 69 (N. D. Ill. 1959) (Film: "Desire Under The Elms"; classification: 21 years of age); People v. The Bookcase, Inc., 14 N.Y.2d—(1964), *reversing* 42 Misc. 2d 55, 247 N.Y.S.2d 470 (App. Div. 1964), *affirming without opinion* 40 Misc. 2d 796, 244 N.Y.S.2d 297 (Crim. Ct. 1963) (Book: "Fanny Hill"; classification: 18 years of age).

[62] Butler v. Michigan, 352 U.S. 380 (1957). In reversing the conviction of defendant for selling a book ". . . tending to the corruption of the morals of youth," the Court said at page 383: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."

[63] Procedurally, *Jacobellis* was brought on appeal from a conviction on two counts for possessing and exhibiting an obscene film in violation of Ohio Revised Code Ann. § 2905.34 (Page 1955).

[64] Readers seeking a more extensive review of current trends in the area of obscenity should consult, in addition to Lockhart & McClure's definitive article, *supra* note 58, Gerber, "A Suggested Solution to the Riddle of Obscenity," 112 U. Pa. L. Rev. 834 (1964).